

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	CIVIL FILE
Donald Sanders,)	NO. 17-CV-5106 (ECT/KMM)
)	
Plaintiff,)	
)	VOLUME VIII
vs.)	
)	
BNSF Railway Company,)	Courtroom 3B
)	Wednesday, December 15, 2021
Defendant.)	St. Paul, Minnesota
)	11:00 A.M.

JURY TRIAL PROCEEDINGS

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE
AND A JURY**

A P P E A R A N C E S:

For the Plaintiff: NICHOLS KASTER, PLLP
By: JAMES H. KASTER, ESQUIRE
LUCAS J. KASTER, ESQUIRE
4700 IDS Center - 80 South Eighth Street
Minneapolis, Minnesota 55402-2242

**For the Defendant: ARTHUR CHAPMAN KETTERING SMETAK
& PIKALA, P.A.**
By: SALLY J. FERGUSON, ESQUIRE
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402-3214

STINSON, LLP
By: TRACEY HOLMES DONESKY, ESQUIRE
50 South Sixth Street - Suite 2600
Minneapolis, Minnesota 55402

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - United States District Court
Warren E. Burger Federal Building & U.S. Courthouse
316 North Robert Street - Suite 146
St. Paul, Minnesota 55101
651.848.1224

1 (11:00 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 (Jury enters)

5 THE COURT: Good morning, everyone. Please be
6 seated.

7 Members of the Jury, have you elected a
8 foreperson?

9 VARIOUS JURORS: Yes.

10 THE COURT: And would that person raise his or her
11 hand.

12 THE FOREPERSON: (Complies).

13 THE COURT: Terrific. Have you reached a verdict?

14 THE FOREPERSON: We have.

15 THE COURT: And do you have that verdict with you?

16 THE FOREPERSON: We do.

17 THE COURT: Could you please hand that down to the
18 court security officer at this time.

19 (Verdict handed to the Court via court security
20 officer)

21 (Pause - Court retrieving verdict from envelope)

22 THE COURT: At this time I'll read the verdict.

23 "We, the Jury in the above-entitled action, for
24 our Special Verdict, answer the questions submitted as
25 follows:

1 "(1) Did Plaintiff Donald Sanders prove, by the
2 greater weight of the evidence, all elements of his FRSA
3 retaliation claim, as set forth in Instruction No. 13?

4 "ANSWER: Yes.

5 "(2) Did Defendant BNSF prove its affirmative
6 defense by clear and convincing evidence, as set forth in
7 Instruction No. 19?

8 "ANSWER: No.

9 "(3) We assess Mr. Sanders damages for lost wages
10 and benefits, from April 29, 2016, through the date of our
11 verdict, if any, in the following amount:

12 "\$ 611,797.00.

13 "(4) We assess Mr. Sanders emotional distress
14 damages, if any, in the following amount:

15 " \$ 250,000."

16 Signed by the jury foreperson, Mr. Grimwood,
17 today.

18 I'll now poll the jury. Members of the Jury, I'm
19 going to ask each of you individually to begin with if this
20 is your true and correct verdict going by number.

21 Mr. Grimwood, is this your true and correct
22 verdict?

23 JUROR GRIMWOOD: Yes, Your Honor.

24 THE COURT: Ms. Esposito, is this your true and
25 correct verdict?

1 JUROR ESPOSITO: Yes, Your Honor.

2 THE COURT: Mr. Williams, is this your true and
3 correct verdict?

4 JUROR WILLIAMS: Yes, Your Honor.

5 THE COURT: Mr. Bonk, is this your true and
6 correct verdict?

7 JUROR BONK: Yes, Your Honor.

8 THE COURT: Ms. Lafleur, is this your true and
9 correct verdict?

10 JUROR LAFLEUR: Yes, Your Honor.

11 THE COURT: Ms. Urick, is this your true and
12 correct verdict?

13 JUROR URICK: Yes, Your Honor.

14 THE COURT: And finally, Mr. Clauer, is this your
15 true and correct verdict?

16 JUROR CLAUER: Yes, Your Honor.

17 THE COURT: Members of the Jury, so say you one,
18 so say you all, is this your true and correct verdict?

19 JURY IN UNISON: Yes, Your Honor.

20 THE COURT: All right. Members of the Jury, one
21 of the instructions that I gave you was something of a heads
22 up, which is that after you reach a verdict depending on the
23 nature of the verdict that you reach, you may be called upon
24 to decide an additional question in this case that was not
25 before you at the time you rendered this verdict.

1 I'm going to excuse you at this time to go back to
2 the -- well, permit you to recess. I'm not excusing you
3 from service just yet. I'm going to permit you to recess to
4 return to the jury room at this time for a brief period so
5 that I may discuss with the lawyers next steps in the case
6 and we will let you know promptly how that is going to
7 proceed. All right?

8 All right. I'll allow you to recess at this time.

9 (Jury excused)

10 THE COURT: Thank you, everyone. Please be
11 seated.

12 All right. I am going to submit the punitive
13 damages question to the jury. At this time I am going to
14 provide you with both the instruction that I propose to
15 submit to the jury and the second -- I guess what we're
16 captioning the Second Special Verdict Form that we would
17 give them with respect to that question.

18 I think the instruction largely parrots the
19 instructions that you all have given me with a couple
20 perhaps changes. It certainly tracks the model instruction
21 that the Eighth Circuit proposes we use in this situation.
22 I think we have more than enough copies for everybody.

23 Given how brief the instruction and verdict form
24 are, what I would ask is that you just take a couple of
25 moments to review it now, discuss it amongst yourselves and

1 then let me know whether you approve or whether you have any
2 concerns or objections to the instruction and the verdict
3 form. I understand BNSF's position thus far with respect to
4 submission of the punitive damages question. I will
5 certainly give you an opportunity to get anything on the
6 record on that you'd like to.

7 (Pause - counsel reviewing documents)

8 MR. JAMES KASTER: We've had a chance to look at
9 the instructions and the verdict form, Your Honor.
10 Plaintiff has no objection.

11 THE COURT: All right.

12 MS. DONESKY: With respect to the Special Verdict
13 Form, we would request because the statute has a \$250,000
14 amount that underneath the amount it should be "Not to
15 exceed" or a "maximum of \$250,000" so that the jury is
16 awarding pursuant to the statute and in line with the
17 statute an amount between 0 and \$250,000.

18 MR. JAMES KASTER: Your Honor, if I can be heard
19 on that question.

20 THE COURT: I don't think you'll want to be heard
21 on that question.

22 MR. JAMES KASTER: Fine.

23 THE COURT: I've decided not to include that for
24 the simple reason that the Jury Instruction Committee in the
25 Eighth Circuit recommends that it not be included, and I am

1 not going to second-guess the wise judgment of my
2 predecessors on that committee. I understand that's an
3 objection.

4 MS. DONESKY: Yes, so now I have it on the record.

5 THE COURT: Yes. Beyond that, does BNSF have --
6 and if you need more time, let me know, but beyond that does
7 BNSF have any objections to the instruction or the verdict
8 form?

9 MS. DONESKY: If I could just have one moment.

10 THE COURT: Certainly. Take all the time you
11 need.

12 (Pause)

13 MS. DONESKY: I have a few remarks, Your Honor.

14 THE COURT: Okay.

15 MS. DONESKY: We would request on the Defendant's
16 side, our proposed jury instruction had -- we had "willful"
17 in addition to the "malice" or "reckless," but we also had
18 definitions to help guide what those requirements or
19 elements would suggest, so we had included some definitions
20 of what those terms mean. That would be one request.

21 The other is that if on the back page of the
22 instruction regarding the decision what they consider, I
23 don't think I see any language -- and we would request to
24 have it -- of something along the lines that we had proposed
25 in consideration of the amount of any punitive damages -- or

1 sorry -- that punitive damages, if any, should be in an
2 amount sufficient to fulfill their purposes, but should not
3 reflect bias, prejudice, or sympathy toward any party.

4 And my last request, just to put them all out
5 there, is, in the Special Verdict Form we would also request
6 "if any" be included in Question 2 like the other verdict
7 form was.

8 THE COURT: All right. Let's deal with those one
9 at a time --

10 MS. DONESKY: Sure.

11 THE COURT: -- to make sure that I understand
12 what's being asked for.

13 I confess that I do not have a copy of your
14 proposed jury instructions handy. What terms did you
15 propose defining in your punitive damages instruction?

16 MS. DONESKY: Our proposed instruction was that it
17 included: "If Defendant's conduct that harmed the plaintiff
18 was willful, malicious, oppressive, or in reckless disregard
19 of Plaintiff's rights. Conduct is malicious if it is
20 accompanied by ill-will or spite or if it is for the purpose
21 of injuring the plaintiff. Conduct is in reckless disregard
22 of the plaintiff's rights if under the circumstances it
23 reflects complete indifference to the plaintiff's safety or
24 rights, or if the defendant acts in the face of a perceived
25 risk that its actions will violate the plaintiff's rights

1 under federal law.

2 And I have a definition of "oppressive" if the
3 Court wants that as well, but there are at least a few
4 definitions in there that we believe are warranted.

5 THE COURT: I'm getting a copy of your proposed
6 instructions right now, I think.

7 (Pause)

8 THE COURT: To the extent BNSF is asking for
9 material that is in its Instruction No. 22 to be included
10 wholesale either as a substitute for the Eighth Circuit's
11 model instruction -- well, let's start there -- as a
12 substitute for the Eighth Circuit's model instruction, I'm
13 going to deny that request. I'm going to stick with the
14 Eighth Circuit's model instruction. Defendant's Proposed
15 Instruction 23 makes its way into the model instruction, or
16 into the draft instruction because it's included in
17 substance, if not word for word, in the last paragraph -- in
18 the last sentence of the second paragraph of the
19 instruction.

20 MS. DONESKY: Yes, I notice that and understand
21 that that's incorporated.

22 THE COURT: Okay. So I'll confess that I did not
23 include Instruction No. 24 for a couple of reasons. Let me
24 articulate those and then see if -- Defendant's proposed
25 instruction includes a phrase that "intentional retaliation

1 does not give rise to punitive damages liability where the
2 employer is unaware of the relevant federal prohibition."
3 And with respect to that piece of this proposed instruction,
4 my understanding of all of the evidence that's come in thus
5 far is that BNSF has not disputed its knowledge and
6 awareness of the prohibition. The first piece of evidence
7 that comes to mind is the retaliation letter that was sent
8 to Mr. Jones, so I don't think that piece would serve a
9 purpose here based on the evidence that's been submitted.

10 Let me stop there and see if BNSF disagrees.

11 MS. DONESKY: We don't object.

12 THE COURT: Okay. Then the second clause is
13 "retaliates with a distinct belief that its retaliatory act
14 is lawful," and I think that that is subsumed within the
15 good-faith effort to comply with the law prohibiting
16 retaliation clause at the end of the second paragraph of the
17 instruction that I've proposed.

18 MS. DONESKY: Yes. We would just preserve the
19 record in the sense that we did propose it as an instruction
20 and understand that the Court has not included it and --has
21 decided not to include it, but we would just -- I'm not
22 making a request for anything further or for that
23 instruction to be incorporated.

24 THE COURT: Okay. Sorry.

25 MS. DONESKY: No, no. That's okay. That's fine.

1 And I presume, then, the Court is denying the request for a
2 sentence that the amount should not reflect bias, prejudice
3 or sympathy toward any party to the end of the instruction.

4 THE COURT: No, I am not denying that request.

5 MS. DONESKY: Oh, okay.

6 MR. JAMES KASTER: Your Honor, I would --

7 THE COURT: I do not intend to deny that request
8 yet. I want to hear about that.

9 Mr. Kaster?

10 MR. JAMES KASTER: And I apologize, Your Honor. I
11 started to speak before the Court was finished with your
12 sentence and I don't mean to talk over the top of the Court.
13 I just want to apologize.

14 I have never seen that separately instructed in a
15 damage instruction, including punitive damages. The jury
16 was already instructed not to let bias, prejudice or
17 sympathy get in the way of their verdict. That is a part of
18 the general instructions. I've never seen that repeated as
19 it relates to a particular item of damages.

20 So the jury doesn't need to be reminded about all
21 of their duties unless the Court is intending to read all
22 the general instructions again. I don't think that's
23 necessary either.

24 So I think -- I object to a separate advisory to
25 the jury now not to let bias, prejudice, or sympathy get in

1 the way of a verdict, because I think that would by
2 necessity given the circumstances and the context be a
3 gentle reminder to the jury not to fulfill the purposes, the
4 full purposes of punitive damages under the circumstances.
5 So I object to that.

6 MS. DONESKY: To be clear, we weren't asking for a
7 separate instruction if that helps, Your Honor, just to have
8 the language included within the instruction.

9 THE COURT: That's what I understood you were
10 asking for.

11 MS. DONESKY: Sure.

12 THE COURT: Okay. I'm going to deny the request.
13 I think Mr. Kaster's got a point. I think both of you have
14 a point, to be honest with you. BNSF's concern, if I'm
15 understanding it correctly, is that that's a particular
16 feature or aspect of the instructions that might have some
17 bearing on this question and I think that's a reasonable
18 request. We did for what it's worth include in the actual
19 damages instruction not just an instruction that you're not
20 supposed to award actual damages by way of punishment. We
21 also said "or through sympathy," so we did sort of repeat
22 that concept there.

23 But I do think that reminding them of one of their
24 duties when they have been put under a host of duties places
25 undue emphasis on one to the exclusion of others. And I do

1 not intend to read all of the instructions again. I do
2 intend, however, to remind them that they continue to be
3 bound by all of the instructions that I have given them
4 previously, so I will do that.

5 MR. JAMES KASTER: And we don't object to that,
6 Your Honor.

7 THE COURT: Okay. So that leaves us with the
8 instruction as drafted. I appreciate everyone's input on
9 that.

10 Okay. Next question is -- oh, sorry. BNSF had a
11 concern about the verdict form.

12 MS. DONESKY: Well, I was requesting the "if any"
13 language that was in the same -- which was added to the
14 verdict form in the other manner of the amount.

15 THE COURT: I think dividing it into two questions
16 takes care of that.

17 MS. DONESKY: Right. I see that.

18 THE COURT: Okay. But objection noted.

19 Next question is how do the parties propose to
20 present the punitive damages question to the jury.

21 Mr. Kaster, let me hear from you first, and I want
22 to know how and how much time.

23 MR. JAMES KASTER: You know, we've talked about
24 this, Your Honor, overnight and with the possibilities
25 involved.

1 How we would like to proceed is we would like to
2 put the 2016, which we think is the most relevant, financial
3 condition statement in evidence and add that by stipulation.
4 I understand they'll preserve their objections to any
5 consideration of punitive damages, but this is a public
6 record and I don't think there's any dispute that this is
7 their 10-K for 2016. So we'd add one exhibit. We would
8 propose that no additional evidence is necessary from the
9 plaintiff's perspective and arguments on that additional
10 question of punitive damages, we think that a half hour per
11 side would be plenty.

12 THE COURT: Let me ask BNSF that question.

13 Let me ask first of all, is it correct that you've
14 stipulated to the admission of that exhibit certainly over
15 BNSF's objection, I understand, to the jury's consideration
16 of punitive damages. However, is that an exhibit to which
17 you have stipulated?

18 MS. DONESKY: Sorry. I was just looking at -- I
19 just realized that good faith isn't a separate question on
20 the verdict, so I'll make that point. Sorry. Could you
21 repeat the question? Are we opposed to the stipulation?

22 THE COURT: Certainly. Sorry. Let me ask this
23 question and then we'll get to the good-faith piece.

24 So the question is, Mr. Kaster has suggested that
25 the 2016 -- is it their --

1 MR. JAMES KASTER: I believe it's their 10-K,
2 their publicly filed 10-K.

3 THE COURT: Has BNSF stipulated to that document's
4 admission?

5 MS. DONESKY: What exhibit number is it?

6 MR. LUCAS KASTER: 283.

7 MR. JAMES KASTER: It's 283. There was only a
8 relevance objection, Your Honor. At this point it is not
9 only relevant, but it is necessary. I think there are cases
10 that suggest that a failure to give the jury financial
11 condition information would be problematic.

12 THE COURT: I don't intend to sustain a relevance
13 objection at this time certainly.

14 MS. FERGUSON: Could we just state something for
15 the record? I don't think there's any issue about BNSF's
16 ability to pay, so therefore that's the basis for the
17 relevance objection.

18 THE COURT: And I'll overrule that. I spent some
19 time last night in the case law on that question and I'm
20 satisfied that I'm right about that, or at least that that's
21 the better answer on that, the better exercise of
22 discretion.

23 Okay. Ms. Donesky, you had another question about
24 the verdict form and I wanted to give you an opportunity
25 to --

1 MS. DONESKY: If we stick on the -- just for terms
2 of proceeding on the evidence from our perspective, I guess
3 what I would propose or what we envision -- and I don't know
4 if Your Honor envisioning sort of separate closing, but what
5 I would appreciate the opportunity to do is refer to
6 exhibits and go up and explain to the jury -- basically
7 make -- provide evidence to the exhibits that they should be
8 referring to and make some type of -- I guess another type
9 of argument relating to the evidence that would show that
10 the burden hasn't been met, but I think all the exhibits
11 that we would be referring to have all been put into the
12 record already, but that would be what I would envision.

13 MR. JAMES KASTER: And, Your Honor, our view is
14 that all the evidence of record is properly referred to in
15 this closing. Anything that was in the underlying record
16 can be referred to in this second stage of the bifurcated
17 trial.

18 MS. DONESKY: But do you envision making
19 additional argument to the jury?

20 MR. JAMES KASTER: Yes.

21 MS. DONESKY: Yeah. Okay.

22 MR. JAMES KASTER: Yes.

23 THE COURT: You both envision making additional
24 argument to the jury, so let me ask the hard question.
25 Mr. Kaster said a half hour.

1 MS. DONESKY: Twenty minutes to a half hour, yeah.
2 I don't think it would take longer than 30 minutes from my
3 perspective.

4 THE COURT: Okay. Then here's what I propose to
5 do. We're going to check on one thing here.

6 (Pause)

7 While we're checking on that, Ms. Donesky, let me
8 go back to the special verdict form. I think what you were
9 getting at is a second question that said: Do you find that
10 BNSF has proved by the greater weight of the evidence that
11 it made a good-faith effort?

12 MS. DONESKY: As a separate question to preserve
13 the record. I'm assuming you've rejected that, but I did
14 want to make note -- okay.

15 THE COURT: No, I hadn't thought about it and I
16 think it -- I think it makes sense. I'm fine with that. I
17 don't see a problem with that.

18 MR. JAMES KASTER: And the question would be what,
19 Your Honor?

20 THE COURT: "Did BNSF prove by the greater weight
21 of the evidence that BNSF made a good-faith effort to comply
22 with the law prohibiting retaliation?" So if the answer is
23 yes to 1, then that's an out that BNSF has almost along the
24 lines of an affirmative defense if I'm understanding the
25 instruction correctly.

1 MR. JAMES KASTER: Your Honor, that question is
2 subsumed within Question 1. It's redundant. And I object
3 to a separate question on this issue of proof of punitive
4 damages. It's essentially two questions that ask the same
5 question of the jury as to whether or not the standard for
6 punitive damages has been met. I don't understand that to
7 be a shifting burden of proof under the circumstances.

8 I mean, we have to prove -- "If you find" -- I'm
9 reading from the instruction.

10 "If you find that BNSF acted with malice or
11 reckless indifference ... and did not make a good-faith
12 effort to comply with the law, then, in addition to any
13 other damages to which you find Mr. Sanders is entitled, you
14 may, but are not required to, award Mr. Sanders an
15 additional amount HAMENT as punitive damages"

16 We have to effectively prove in that sentence a
17 negative. Giving them an additional opportunity to prove
18 this as an affirmative defense is duplicative and
19 unnecessary and I think it's confusing.

20 MS. DONESKY: I was referring to the sentence
21 above it which would suggest that BNSF has to prove by the
22 greater weight of the evidence that it made a good-faith
23 effort.

24 THE COURT: I think if BNSF's got something that
25 is its burden to prove, then it justifies a second question.

1 I don't think it means we need to change the first question.
2 I don't think it's confusing. I'm going to overrule
3 Plaintiff's objection on this one and I will include a
4 second question that is along the lines of: "Did BNSF prove
5 by the greater weight of the evidence that BNSF made a
6 good-faith effort to comply with the law prohibiting
7 retaliation?" If yes, stop; if no, then continue to the
8 next question. I'll edit the form. I will get you drafts
9 of the form so that you can take another look at it once
10 more before we submit it to the jury.

11 MS. DONESKY: Your Honor, I'm going to make one
12 more plea for the "if any" in the last question, because the
13 instruction reads, to the point Mr. Kaster just read:

14 "If you find that BNSF acted with malice or
15 reckless indifference" and so forth, "then, in addition to
16 any other damages to which you find Mr. Sanders is
17 entitled," which actually maybe needs to be struck because
18 they already found damages, because that's referring to an
19 instruction that they're given not in a bifurcated way --
20 "you may, but are not required to, award Mr. Sanders an
21 additional amount as punitive damages" Therefore, I
22 believe that the "if any" is appropriate based on that
23 language.

24 THE COURT: I'll think about it. I understand you
25 object. I'll think about it. It's in the instruction and I

1 think it's pretty clear from the instruction, but I'll think
2 about that one.

3 MS. DONESKY: Okay.

4 THE COURT: It does have the virtue of consistency
5 with the prior Special Verdict Form. They are used to
6 seeing it.

7 Okay. All right. Then here's what we're going to
8 do. The jury's got their lunches, they're being delivered
9 now, which is serendipitous, so that gives us an hour.
10 We'll give them an hour to eat lunch and begin promptly then
11 with closings on the punitive damages question at 12:35. I
12 will give each side 35 minutes to make its punitive damages
13 argument and given -- do you want the clock on or not?

14 MR. JAMES KASTER: Luke, do you want the clock on?
15 Do you want a reminder that you're almost out of time?

16 (Laughter)

17 MR. LUCAS KASTER: Sure.

18 THE COURT: Or do you want me to interrupt you
19 again?

20 MR. LUCAS KASTER: I appreciate the Court doing
21 that yesterday. I had taken the wrong time down as my
22 start, so I appreciate the Court giving me that reminder.

23 THE COURT: Then we'll do it. We'll put 35
24 minutes up there. We'll tilt it in a way where the jury has
25 a little harder time seeing it.

1 Can we do that? I've been given a look as though
2 that will be a difficult thing to do. We'll do our best.
3 So keep an eye on the clock and you'll have the lights and
4 so forth that give you some indication of what time you've
5 got left.

6 Upon the conclusion of that hour and ten minutes
7 of argument, no break in between, my intention then would be
8 to instruct the jury and permit them to return to deliberate
9 on that question. Is Plaintiff okay with that?

10 MR. JAMES KASTER: Yes.

11 MR. LUCAS KASTER: Yes.

12 THE COURT: Okay. BNSF?

13 MS. DONESKY: Yes.

14 THE COURT: All right. I will get to work on the
15 Second Special Verdict Form right now. I'll get whatever
16 revised version of that I decide on in to you as
17 expeditiously as possible so that you may review that. I'll
18 be in here for just a couple of minutes before we call the
19 jury in to deal with any outstanding objections on that and
20 then we'll proceed.

21 MR. JAMES KASTER: Thank you, Your Honor.

22 THE COURT: Thanks, everyone.

23 (Recess taken at 11:37 a.m.)

24 * * * *

1 (12:35 p.m.)

2 IN OPEN COURT

3 (Without the jury)

4 THE COURT: Please be seated, everyone.

5 All right. Let me start with the plaintiff. Is
6 there anything that the plaintiff thinks we need to address
7 here before we get the jury in?

8 MR. JAMES KASTER: I think I previously made a
9 record regarding the addition of Question 2. I'm sorry. Do
10 I have the wrong Special Verdict Form? Is it Question 3 was
11 the new one? No, it's Question 2. So I just note our
12 objection to Question 2.

13 THE COURT: Understood.

14 MR. JAMES KASTER: Also, Your Honor, I don't know
15 that we need to do this in front of the jury, but I think
16 having -- the court having ruled on the relevance objection
17 to 283, we just want the record to reflect that 283, that we
18 move its admission.

19 THE COURT: And over BNSF's objection it's
20 admitted.

21 MR. JAMES KASTER: Thank you.

22 THE COURT: How about from BNSF's side?

23 MS. DONESKY: Nothing further.

24 THE COURT: Okay. I'll give the jury just a short
25 preview of what they're here to do and then I'll turn it

1 over to the defendant to argue first. We'll keep the same
2 order. Any objection to that?

3 MR. JAMES KASTER: No, Your Honor.

4 MS. DONESKY: No, Your Honor.

5 THE COURT: Okay. Great.

6 (Jury enters)

7 THE COURT: Please be seated, everyone.

8 Members of the Jury, as I indicated earlier after
9 you reached a verdict on the questions with respect to which
10 you have reached a verdict, I gave you a heads up that you
11 may be called upon to decide an additional question in
12 the case that was not before you then, and that question is
13 before you now. It is the issue of punitive damages.

14 We will not be taking any additional testimony
15 with respect to that issue. Instead, what the lawyers will
16 do is argue each for 35 minutes or so, or less, each side,
17 and then I will give you one instruction on that question
18 and then I will ask you to deliberate on that question.

19 BNSF will present their argument first. Plaintiff
20 will present his argument second.

21 Ms. Donesky?

22 MS. DONESKY: Thank you, Your Honor.

23 THE COURT: Let's wait one second so the jury can
24 get notepads in front of them.

25 (Pause)

1 THE COURT: Ms. Donesky?

2 MS. DONESKY: Thank you.

3

4 **DEFENDANT'S ARGUMENT ON PUNITIVE DAMAGES**

5 MS. DONESKY: Ladies and Gentlemen of the Jury,
6 Counsel:

7 As the judge just previewed for you, you now have
8 one additional verdict form to complete and evidence and
9 decisions to make. This relates to the punitive damages.

10 And I want to start by focusing on what the
11 instruction to you will be and the high standard required
12 for the plaintiff to meet in order for him to meet this high
13 burden, and it will read as follows:

14 "You now must decide whether Defendant BNSF acted
15 with malice or reckless indifference to Mr. Sanders' right
16 not to be terminated on the basis of his engaging in
17 protected activity."

18 The standard requires a showing of "malice or
19 reckless indifference if it has been proved that BNSF or a
20 BNSF official or officials responsible for firing
21 Mr. Sanders (A) knew that the firing of Mr. Sanders was in
22 violation of the Federal Railroad Safety Act or [] acted
23 with reckless disregard of that law. However, you may not
24 award punitive damages if BNSF has proved by the greater
25 weight of the evidence that BNSF made a good-faith effort to

1 comply with the law prohibiting retaliation."

2 That is the standard or standards that you will be
3 asked to review against the evidence that was presented.
4 Plaintiff bears the burden of proving malice or reckless
5 indifference and we have the burden to show you good faith,
6 and we believe the evidence shows the plaintiff can not be
7 meet his burden and at minimum that this evidence shows that
8 BNSF acted with good faith to comply with the law.

9 And I want to begin with Exhibit 30 and it'll come
10 up on the screen for you. I want you to consider that as of
11 December 15th of 2015 when HR reviewed the complaint, the
12 first complaint that Mr. Sanders brought, in addition to the
13 disciplinary measure that was taken, they also gave to
14 Mr. Jones an anti-retaliation letter, and I'd like to focus
15 on a couple of those provisions that were advised to
16 Mr. Jones at that time.

17 MS. DONESKY: The last three paragraphs, please.

18 And I will read them to you. This letter from
19 BNSF advised and reminded Mr. Jones: "Retaliation is
20 prohibited and will not be tolerated. You are advised to
21 treat a person as if he or she has never complained of
22 discrimination or opposed perceived discriminatory company
23 practices. As a people leader, it is also your
24 responsibility to ensure that others continue to treat the
25 person as if he or she had never complained of

1 discrimination.

2 "The employee should be held accountable for the
3 same behavior/conduct for which other employees are also
4 held accountable.

5 "In order to ensure you are not retaliating
6 against an employee" -- oh, sorry. I'll go to the next
7 page. He's advised of these two paragraphs, but I want to
8 focus then too on the last paragraph of this letter. He was
9 given various guidances.

10 And this paragraph ends -- thank you -- "Prior to
11 terminating or suspending the employee, the decision must be
12 reviewed, underlined, must be reviewed with a supervising
13 AVP or above to ensure the decision is based on valid
14 business reasons and is not intended to be retaliatory."

15 This was provided to Mr. Jones. This is a
16 preventive measure that BNSF instituted and provided as of
17 December of 2015. This is the opposite to retaliation. It
18 is intended to prohibit and prevent retaliation, and that
19 was its purpose and that was its intent and it was issued.

20 And it also shows, the record also shows, that
21 those provisions were followed and the guidances were taken,
22 and I'd refer to the multilevel review process that was
23 undertaken prior to Mr. Sanders' dismissal.

24 Consider that Mr. Jones prior to even initiating
25 the hearing notices under the Collective Bargaining

1 Agreement, they consulted and worked with labor relations.
2 They sought additional guidance. Consider that prior to the
3 termination itself, even prior to observing Mr. Sanders,
4 Mr. Jones advised Ms. Hoppenrath to go to labor relations
5 and seek their consultation.

6 Consider that after Mr. Jones, given his role as
7 Mr. Sanders' supervisor and consistent with their practice,
8 reviewed the hearing transcript, provided his review of the
9 record, but look at what he did after that. He sent the
10 recommendation, the hearing transcripts, to Ms. Detlefsen.
11 They got labor relations. And Ms. Detlefsen, her testimony:
12 I conduct an independent review of the record to determine
13 if termination is supported.

14 This is process far above what normally happens in
15 America when at-will employees have decisions that are made.
16 We have labor relations independently looking at the hearing
17 record. And she also said, "I don't consider the
18 recommendation. I look at the record."

19 On top of that you then have Ms. Detlefsen who
20 sees that retaliation has been argued in the hearing
21 transcripts, and what does she do? She takes additional
22 protective measures. She goes and she consults with human
23 resources and legal before making the decision and before
24 advising back to the field that she supports dismissal.
25 Those two are additional protective, preventive measures

1 that were taken to ensure that retaliation wasn't the reason
2 for the dismissal.

3 Beyond that, you have labor appeals that were
4 taken from that. You have two governmental bodies who
5 independently looked at the facts and concluded that
6 Mr. Sanders' dismissal was proper, as additional reason that
7 the decision that was made and that Plaintiff cannot show
8 decision was made in reckless disregard for the law. The
9 actions that were taken belie that.

10 Consider as well the policies BNSF has in place
11 within the company. Mr. Freshour touched on some of that in
12 his testimony, but at Exhibits 94, 95, 96, 97. They have a
13 hotline complaint that's advised through a completely third
14 party. It's not even BNSF-affiliated. It's run through a
15 third party, all the measures they have for reporting
16 concerns of discrimination and addressing them. You can go
17 to your manager, you can go to human resources, you can go
18 to hotline. They have multiple mechanisms to bring concerns
19 of retaliation to the forefront and to be reviewed.
20 Exhibits 98, 99, 100, even a posting on the Federal Railroad
21 Safety Act, Exhibit 101. They have those posted in the
22 workplace.

23 These are all measures to advise employees that
24 you have rights and you have rights to not be discriminated
25 against or retaliated against. They're posted at the

1 company.

2 They do annual trainings. Mr. Freshour spoke of
3 that. Mr. Freshour spoke of the fact that employees each
4 year have an annual training, anti-discrimination,
5 anti-retaliation training, and you saw it in action.

6 Magenta Eggertsen, February of 2016. What was she
7 doing? She was providing the annual training to the
8 maintenance of way employees. Mr. Sanders was there,
9 Ms. Hoppenrath was there. There's a long sign-in sheet of
10 many individuals who attended that annual training provided
11 by Ms. Eggertsen. These are measures and steps and efforts
12 made by the company to ensure that actions are taken, not
13 for discriminatory and not for retaliatory purposes.

14 I would ask based on the information that's
15 provided in the record and the information that I've just
16 gone through that both -- you'll have the verdict form.
17 You'll be shown a verdict form. It will have two questions.

18 The first question will ask whether the plaintiff
19 has met the high burden to show reckless disregard or malice
20 in the actions in question. We submit that the plaintiff
21 cannot meet that high burden and that that question would be
22 answered with no.

23 And at minimum, we would submit that the second
24 question, which provides and discusses BNSF's good-faith
25 effort, that at minimum the evidence that I have just

1 outlined provides that BNSF did act in good faith and that
2 that question should be answered that it has met it and
3 should be answered as yes and that no damages, no punitive
4 damages, should be awarded in this case.

5 Thank you.

6 THE COURT: Mr. Kaster?

7 MR. LUCAS KASTER: Thank you, Your Honor.

8
9 **PLAINTIFF'S ARGUMENT ON PUNITIVE DAMAGES**

10 MR. LUCAS KASTER: Ladies and Gentlemen of the
11 Jury, Counsel, Your Honor:

12 I want to walk through like Counsel did the
13 question that you need to answer, and the first thing you
14 need to answer is did BNSF know its conduct was illegal or
15 did they act in reckless disregard of the law. The record
16 demonstrates that they have a number of written policies
17 that specifically state this type of conduct, this type of
18 retaliation, is illegal, because this law prohibits it. We
19 looked at the policy that specifically prohibited
20 retaliation, we looked at their hotline process or their
21 hotline overview, we looked at their complaint process, all
22 of which indicated to their employees that any type of
23 retaliation for reporting safety concerns or reporting HR
24 complaints is prohibited. So BNSF clearly knew and its
25 managers clearly knew that this conduct was illegal.

1 So then the next question is as Counsel
2 referenced, did they make good-faith efforts to comply with
3 that law, to comply with their knowledge of what they knew
4 the law prohibited.

5 And Counsel just referenced this letter that was
6 sent out, and you heard testimony about an anti-retaliation
7 retaliation process and that process was comprised of that
8 one letter that was sent to Mr. Jones.

9 And by the way, Counsel just referenced and
10 brought up on the screen the fact that any employment
11 decision that was going to be made by Mr. Jones needed to be
12 reviewed by the AVP, and if you remember, the AVP is
13 Mr. Hesterman, not Mr. Jensen. That's the general director.
14 The AVP is Mr. Jensen's boss. And there's zero evidence in
15 the record that Mr. Hesterman was involved in any meeting
16 regarding Mr. Sanders' employment decision. So BNSF failed
17 to even follow its own written policy. The one letter that
18 they sent indicating what their process is they failed to
19 follow.

20 And by the way, that individual who was supposed
21 to be a part of that meeting, Mr. Hesterman, you heard from
22 Mr. Scherbing, who was on a train with Mr. Hesterman later
23 in 2016, that AVP calls Mr. Sanders a lunatic. And
24 Mr. Jensen then rewards and congratulates Mr. Jones in his
25 2016 annual review, saying all of our metrics are up, our

1 scorecards are good, our relationships are good, and Don
2 Sanders no longer works for BNSF. They knew it was
3 unlawful, they didn't even follow their own policies and
4 they surely didn't follow the law.

5 So the answer to Question 1 is yes. We have
6 proven that punitive damages are necessary. And the answer
7 to Question 2 about whether they made good-faith efforts to
8 comply with the law or comply with even their written
9 policies is no.

10 So then the question becomes what do you look at
11 for damages, and you'll see on the second page of the
12 instruction there's three factors that you look at: the
13 reprehensibility of their conduct, the harm caused to
14 Mr. Sanders, and BNSF's financial condition. And we look at
15 the financial condition to determine what amount of punitive
16 damages is necessary to punish the company, but also deter
17 them and other companies from engaging in this type of
18 conduct, so let's walk through those.

19 The reprehensibility of BNSF's conduct. As we
20 heard throughout the case, Mr. Sanders filed multiple
21 complaints with HR. Those complaints went to multiple
22 people within the HR department, all the way up to
23 Mr. Freshour's boss, who's an AVP in human resources, who
24 did nothing to stop what was happening.

25 And then we hear from multiple people who took the

1 witness stand and spoke to Mr. Freshour during his
2 investigation into Mr. Sanders' complaints who said shade
3 this type of conduct happens all the time and this is the
4 reason I left that job, and each and every one of those
5 complaints went ignored. The highest HR official in the
6 Twin Cities or this region said that was no indication of
7 harassment or retaliation, none.

8 That's what BNSF believes, that's what BNSF thinks
9 of employees like Mr. Sanders, and the multiple people who
10 supported his story in terms of what was happening in this
11 company, and each and every one went ignored.

12 And then there's the multi-review process that
13 Counsel referenced. This is an opportunity for the company
14 to say: "Hold on a second. Let's stop. Let's think about
15 this. Let's make sure that our decisions make sense and are
16 following our policies, our practices, that we're complying
17 with the law. Multiple steps, multiple people within the
18 company, and nobody raised the concern at all, that the same
19 individual who was the subject of the complaint is the
20 person attempting to terminate him. The light bulb never
21 went off for anybody. And maybe it did behind closed doors,
22 but we didn't hear about it and nobody stopped it and nobody
23 raised a concern.

24 You see in their policies and we brought it up in
25 their hotline in the internal control plan that overviewed

1 their complaint process, they talked about a speak-up
2 culture. This isn't a speak-up culture. This is a shut up
3 culture. Go to work, do your job, and that's it. That's
4 what this culture is.

5 The second element, the harm to Mr. Sanders.
6 We've talked about it to some extent, but I want you to
7 think about this:

8 You heard from Ms. Grobe, you heard from
9 Mr. Sanders, you heard from Dr. Boisso, who talked about
10 what it's like to be an employee when you've been branded as
11 a liar, as a cheat, as someone who steals, and how hard that
12 is to then carry with you through your lifetime of work.
13 Mr. Sanders has had to carry that already for five years and
14 he's going to have to carry that for a long period of time
15 still, because there are going to be companies who see the
16 public documents that are out there who don't learn the
17 whole story and believe he's still that person, because they
18 branded him. They put a scarlet letter on his chest and
19 they said this person can't be trusted.

20 Then they sent him home to have to tell his family
21 about what happened. That's the harm to Mr. Sanders.

22 And then the final factor is what's the financial
23 condition of the company, what amount of money is going to
24 deter the company from engaging in this conduct again and
25 punishing them.

1 So if we can bring up Exhibit 283, please.

2 This is the 10-K filing, so this is the public tax
3 document that is filed by BNSF, and it's for the year 2016.

4 And so if we can go to page 48 of this exhibit.

5 And on the bottom there are some quarterly
6 figures, and I wanted to give you some quarterly figures to
7 give you a sense of the amount of income the company is
8 generating.

9 And so this is for 2016 and these numbers are in
10 millions. What I want you to look at is in the first
11 quarter of 2016, so in the quarter that they're
12 investigating and terminating Mr. Sanders, BNSF made
13 \$784 million as a company in that quarter.

14 And then we heard Mr. Shearer testify that at the
15 time there was about eight to ten divisions throughout the
16 company. So using the higher number ten, in part because
17 it's easier to do math, when you divide 784 million by ten,
18 you get \$78 million. \$78 million is what the company earned
19 from the Twin Cities division in the first quarter of 2016.

20 So the question you all need to answer is what
21 amount of money is going to stop this culture, because it's
22 not a decision, it's not a one-off. You heard that from
23 employees. What amount of money is going to stop this
24 culture of retaliation. I give you these numbers to give
25 you some type of benchmark for your consideration and also

1 the number we ended on yesterday, that in the fall of 2015,
2 BNSF was focused on slow orders because they got a new
3 hundred million dollar contract, and this area in the
4 St. Paul sub, it was key to the success of that contract.
5 So I give you those numbers as a benchmark.

6 We believe the answer to Question 1, whether we've
7 proven by the greater weight of the evidence that punitive
8 damages are necessary under the standard would be yes. The
9 answer to Question 2 about whether they've proven good faith
10 should be no, and that figure about what is going to stop
11 this culture of retaliation. I give you these numbers as
12 benchmarks, but you all have to determine based upon the
13 evidence you've heard what that figure is.

14 So we ask that you rule in Mr. Sanders' favor and
15 award him punitive damages. Thank you for your time.

16 THE COURT: All right. Members of the Jury, at
17 this time I will invite Ms. Morton to pass out the
18 instruction that I'll be reading to you along with the
19 Second Special Verdict Form.

20 (Documents distributed to the jury)

21 THE COURT: As that's happening, I will caution
22 you that all of the instructions that I have given you to
23 this point remain in effect. This is an additional
24 instruction, not a replacement. It is in addition to the
25 instructions that you have received already which, as I say,

1 remain in effect.

2
3 **COURT'S INSTRUCTION ON PUNITIVE DAMAGES**

4 THE COURT: Turning to Instruction No. 22.

5 In addition to the damages mentioned in other
6 instructions, the law permits the jury under certain
7 circumstances to award punitive damages. Plaintiff Don
8 Sanders has the burden of proving by the greater weight of
9 the evidence that punitive damages should be awarded and, if
10 so, the amount of any such damages.

11 You now must decide whether Defendant BNSF acted
12 with malice or reckless indifference to Mr. Sanders' right
13 not to be terminated on the basis of his engaging in
14 protected activity. BNSF acted with malice or reckless
15 indifference if it has been proved that BNSF or a BNSF
16 official or officials responsible for firing Mr. Sanders (A)
17 knew that the firing of Mr. Sanders was in violation of the
18 Federal Railroad Safety Act, ("FRSA") or (B) acted with
19 reckless disregard of that law. However, you may not award
20 punitive damages if BNSF has proved by the greater weight of
21 the evidence that BNSF made a good-faith effort to comply
22 with the law prohibiting retaliation.

23 If you find that BNSF acted with malice or
24 reckless indifference to Mr. Sanders' rights and did not
25 make a good-faith effort to comply with the law, then, in

1 addition to any other damages to which you find Mr. Sanders
2 is entitled, you may, but are not required to, award
3 Mr. Sanders an additional amount as punitive damages for the
4 purposes of punishing BNSF for engaging in such misconduct
5 and deterring BNSF and others from engaging in such
6 misconduct in the future. You should presume that
7 Mr. Sanders has been made whole for his injuries by the
8 damages awarded under Instruction No. 21.

9 If you decide to award punitive damages, you
10 should consider the following in deciding the amount of
11 punitive damages to award:

12 1. How reprehensible BNSF's conduct was. In this
13 regard, you may consider whether the harm suffered by
14 Mr. Sanders was physical or economic or both; whether there
15 was violence, deceit, intentional malice, reckless disregard
16 for human health or safety; whether BNSF's conduct that
17 harmed Mr. Sanders also posed a risk of harm to others;
18 whether there was any repetition of the wrongful conduct and
19 past conduct of the sort that harmed Mr. Sanders.

20 2. How much harm BNSF's wrongful conduct caused
21 Mr. Sanders in the past and could cause him in the future.
22 You may not consider harm to others in deciding the amount
23 of a punitive damages award.

24 3. What amount of punitive damages, in addition
25 to the other damages already awarded, is needed, considering

1 BNSF's financial condition, to punish BNSF for its wrongful
2 conduct toward Mr. Sanders and to deter BNSF and others from
3 similar wrongful conduct in the future.

4 The amount of any punitive damages award should
5 bear a reasonable relationship to the harm caused to
6 Mr. Sanders.

7 And again, each of you has been provided with a
8 copy of the Second Special Verdict Form which is
9 self-explanatory.

10 At this time I'll invite the court security
11 officer forward to escort the jury back to the jury room
12 under the oath that was previously administered.

13 And please deliberate consistent with the
14 instructions that are being provided already.

15 (Jury excused)

16 THE COURT: Please be seated.

17 All right. Just to make sure, is there anything
18 further that we need to deal with at this time from the
19 plaintiff's perspective?

20 MR. JAMES KASTER: No, Your Honor. I'll just note
21 that we're likely to stick around here.

22 THE COURT: How about from BNSF's perspective?

23 MS. DONESKY: Nothing further.

24 THE COURT: I'll adjourn and we'll let you know
25 when we have a verdict.

1 MR. JAMES KASTER: Thank you.

2 (Jury begins second deliberations at 1:12 p.m.)

3 * * * *

4 (2:10 p.m.)

5 IN OPEN COURT

6 (Jury enters)

7 THE COURT: Please be seated, everyone.

8 Mr. Foreperson, has the jury reached a verdict?

9 THE FOREPERSON: We have, Your Honor.

10 THE COURT: Do you have that with you? I'll
11 invite you to hand that to the court security officer at
12 this time, please.

13 (Verdict handed to the Court via court security officer)

14 THE COURT: Thank you.

15 And, Members of the Jury, we'll go through the
16 same routine that we did the last time.

17 (Pause - Court retrieving verdict from envelope)

18 I'll read the verdict at this time.

19 "We, the Jury in the above-entitled action, for our
20 Special Verdict, answer the questions submitted as follows:

21 "(1) Did Plaintiff Donald Sanders prove, by the
22 greater weight of the evidence, that he is entitled to
23 punitive damages, as set forth in Instruction No. 22?

24 "ANSWER: Yes.

25 "(2) Did Defendant BNSF prove, by the greater

1 weight of the evidence, that it made a good-faith effort to
2 comply with the law prohibiting retaliation, as set forth in
3 Instruction No. 22?

4 "ANSWER: No.

5 "(3) We assess Mr. Sanders punitive damages, if
6 any, in the following amount:

7 "\$ 8,600,000.00"

8 Dated December 15th and signed by the Foreperson.

9 All right. At this time I will poll the jury as I
10 did before.

11 Mr. Grimwood, is this your true and correct
12 verdict?

13 JUROR GRIMWOOD: Yes, Your Honor.

14 THE COURT: Ms. Esposito, is this your true and
15 correct verdict?

16 JUROR ESPOSITO: Yes, Your Honor.

17 THE COURT: Mr. Williams, is this your true and
18 correct verdict?

19 JUROR WILLIAMS: Yes, Your Honor.

20 THE COURT: Mr. Bonk, is this your true and
21 correct verdict?

22 JUROR BONK: Yes, Your Honor.

23 THE COURT: Ms. Lafleur, is this your true and
24 correct verdict?

25 JUROR LAFLEUR: Yes, Your Honor.

1 THE COURT: Ms. Urick, is this your true and
2 correct verdict?

3 JUROR URICK: Yes, Your Honor.

4 THE COURT: And, Mr. Clauer, is this your true and
5 correct verdict?

6 JUROR CLAUER: Yes, Your Honor.

7 THE COURT: And I'll ask you all together:

8 Members of the Jury, is this your true and correct
9 verdict, so say you one, so say you all?

10 JURY IN UNISON: Yes, Your Honor.

11 THE COURT: All right. Thank you.

12 Members of the Jury, you are excused at this time.
13 I'll invite you to return to the jury room. Ms. Morton will
14 follow you back and give you just a couple of additional
15 instructions, and on behalf of all here I'll stay and talk
16 with the lawyers for just a moment.

17 (Jury excused)

18 THE COURT: Thank you. Please be seated.

19 Do the parties have suggestions for how best -- or
20 a timeline for addressing post-trial motions?

21 MR. JAMES KASTER: I think it would be -- given
22 the holidays coming up, I think that possibly a conversation
23 between the lawyers about how to accommodate that, as well
24 as whatever scheduling the Court has in mind.

25 THE COURT: Okay. Why don't I let the parties

1 talk and discuss the timetable for scheduling post-trial
2 motions and submissions and so forth. If you can agree,
3 terrific. I would be inclined given our schedule after
4 January 1st, frankly, to go along with whatever schedule you
5 suggest is appropriate.

6 We have now more than a trial a month between now
7 and the end of June, so we are going to be rather busy,
8 meaning I don't think it would do you any good to establish
9 a schedule expecting that I would be able to look at it
10 immediately, but obviously we will give those motions
11 attention in due course and as expeditiously as we're able,
12 but you get the point. I'm not asking you to submit
13 something on a rocket docket here.

14 MR. JAMES KASTER: Your Honor, we will have to
15 assemble our fee petition as well, so that will be a part of
16 the entourage of post-trial motions.

17 THE COURT: All right. What I'll invite you to do
18 then is put your heads together on those issues, come up
19 with a stipulation and submit it. If you're not able to do
20 that, let me know and I can resolve any disputes in that
21 regard.

22 Is there anything that the plaintiff would like to
23 get or thinks it needs to get on the record here today
24 before we adjourn?

25 MR. JAMES KASTER: No, Your Honor. I would

1 inquire -- and I apologize if I have ignored this in the
2 Court's -- any advisories from the Court, but what, if any,
3 advisory does the Court have for us on speaking with the
4 jury?

5 THE COURT: I'm going to get back to you on that.
6 How about BNSF?

7 MS. DONESKY: Yes, that was one of the questions
8 we had as well. And then the other one, though, however, is
9 that BNSF would make a motion for the Court to make an
10 instant remittitur of the amount per law to the statutory
11 amount of \$250,000 to the Second Special Verdict Form.

12 MR. JAMES KASTER: And we would like to review
13 that before agreeing to any kind of -- I understand that
14 that will eventually happen, but I don't know that it
15 happens instantaneously.

16 THE COURT: I don't see a reason why not to do it,
17 but I'll give you time deal with it.

18 MR. JAMES KASTER: What I recall, Your Honor, is
19 this --

20 THE COURT: Let's just do it this way.

21 MR. JAMES KASTER: Fine. Fair enough.

22 THE COURT: We'll deal with it as part of the
23 post-trial motions.

24 MS. DONESKY: Well, I do -- given the statute
25 states what it is, there really isn't any determination to

1 be made, and given that, you know, this would be as stated
2 when it's not going to be by statute, that we believe that
3 an instant remittitur is appropriate and required.

4 Otherwise, I think there's a significant concern of
5 prejudice as to the impression that that would leave, so we
6 would ask for it to be instantly adjusted.

7 MR. JAMES KASTER: The judgment is entered on the
8 verdict. It's a public verdict. The remittitur as a matter
9 of law is a part of post-trial motions. But the verdict is
10 a public verdict and it needs -- it needs to conform to the
11 award from the jury.

12 THE COURT: I'll deal with remittitur as part of
13 post-trial motions.

14 So to the extent the motion is that I make that
15 judgment immediately, that's denied, but it's without
16 prejudice, obviously, to dealing with that issue as part of
17 the parties' post-trial motions.

18 Anything further from BNSF at this time?

19 MS. DONESKY: Nothing further at this time.

20 THE COURT: Okay. All right.

21 Thank you, everyone. I will get back to you in
22 some fashion on jury contact. I'm going to make a note to
23 remind myself of that right now, and we are adjourned.

24 Thank you.

25 (Proceedings concluded at 2:21 p.m.)

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* * * * *

E X H I B I T S

<u>NUMBER</u>	<u>FOR ID IN EVIDENCE</u>
Plaintiff 283	1345

C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter
for the United States District Court, do hereby
certify that the foregoing pages are a true and
accurate transcription of my shorthand notes,
taken in the aforementioned matter, to the best
of my skill and ability.

/s/ Timothy J. Willette

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - U.S. District Court
Warren E. Burger Federal Building & U.S. Courthouse
316 North Robert Street - Suite 146
St. Paul, Minnesota 55101
651.848.1224